TENGKU AISHAH SULTAN HJ. AHMAD SHAH & ORS.

v.

WARDLEY LTD.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. D2-22-1914-89]
28 FEBRUARY 1992

CIVIL PROCEDURE: *Pleadings - Plaintiffs cause of action based on tort - Defendant to advise plaintiff on currency fluctuations - Loan agreement so executed by plaintiffs in Malaysia - Executed in Singapore by defendant's agent - Agreement completed in Singapore - Agreement carries - Foreign jurisdiction clause - Issue - Jurisdiction - Whether follows the plaintiff or the defendant, the tortfeasor - Whether the effect of foreign jurisdiction clause in the contract - Plaintiffs had entered appearance in Singapore Court - Whether present suit attempt to preempt defendant's conduct - Section 23 of the Courts of Judicature Act 1964 O. 12 r. 7 Rules of the High Court 1980.*

CIVIL PROCEDURE: *Leave to serve a writ outside the jurisdiction - Quantum of discretion - Principles to be considered - When the exercise of such discretion is called for - Letter and spirit of the rule - Whether the exercise of the said discretion by the learned SAR - That is to have notice of the writ and summons served outside the jurisdiction - Whether proper and lawful exercise of that discretion - O. 11 r. 4 Rules of the High Court 1980.*

The defendant is a merchant banker carrying on business in Singapore and had pursuant to a loan agreement dated 30 April 1984 lent the plaintiffs who are Malaysian citizens, residing in Malaysia, in Swiss francs, the equivalent of A$1.160 million to enable the plaintiffs to purchase properties in Freemantle, Western Australia.

Upon the parties concluding the loan agreement. The plaintiffs had paid A$10,000 - to the defendant as management fee for all advice rendered or to be rendered by the defendant touching upon and concerning the loan, particularly in all matters relating to fluctuations in currencies so as to enable the plaintiffs to enjoy the greatest advantage in consequence of such currency, fluctuations and which the plaintiffs maintain, form part of the implied term in the loan agreement.

The learned Judge observed that 6 days after the filing of this suit, and on 13 September 1989, the defendant filed against all the plaintiffs C.S. 1730/83 in the High Court of Singapore (the Singapore suit) seeking principally the return of the loan and following proceedings under O. 14 judgment was entered against the plaintiffs for all sums claimed in the Singapore suit.

The present writ and statement of claim was filed on 7 September 1985 and leave to issue a notice of such a writ of summons and service of it on the defendant in Singapore was obtained in 8 September 1985 under O. 11 r. 4 RHC 1980.

The defendant had applied under O. 12 r. 7 to have the order dated 7 September 1989 to be set aside and the grounds pleaded raised two questions at issue for the Court to decide upon.

(1) The Court has no jurisdiction to try this suit under s. 23 of the Courts of Judicature Act 1964 and

(2) The exercise of the SAR's discretion under O. 11 r. 4 was not proper.

Held:

[1] The fact that the plaintiffs reside in Malaysia is immaterial as jurisdiction does not follow the plaintiffs but the defendant, the tortfeasor. The plaintiffs have also, by their own conduct submitted to the jurisdiction of Singapore Courts. They had entered unconditional appearance to the Singapore suit and they were heard in the subsequent O. 14 proceedings.

[2] If the plaintiffs believe they had a cause of action against the defendant, they should have filed a counterclaim in the Singapore suit and not preempt the defendant's conduct by filing this suit seeking a declaration that they are not indebted to the defendant.

[3] Under Clause 15.10 of the loan agreement, the parties have agreed that the agreement shall be governed by and construed with the laws of Singapore. Under Clause 15.11(a)(i) of the same agreement, the plaintiffs had agreed to submit to the non-exclusive jurisdiction of the Courts of Singapore and Malaysia and any State or Federal Court of Australia as the bank may elect.

[4] What is the effect of the presence of a foreign jurisdiction clause in a contract? Since this foreign jurisdiction clause gives the defendant the right to elect the Courts where disputes should be heard and determined and by filing the Singapore suit, the defendant has clearly indicated that the Singapore Court shall have the jurisdiction to try all disputes arising from the loan transaction.

[5] Leave to serve a writ outside the jurisdiction is always discretionary and the general principles to be considered when the exercise of such a discretion is called for are laid down in *G.A.F. Corporation v. Amchem Products Inc.* [1975] 1 LLR 601.

[6] On the facts and on the law, the substance of the dispute before this Court is clearly one for which this Court has no jurisdiction to decide and determine. To that and the exercise of the discretion by the SAR on 8 September 1989 to have the notice of the writ and summons served outside the jurisdiction was not a proper exercise of that discretion.

[Appeal dismissed with costs.]

Cases referred to:

Castree v. E.R. Squibb & Sons Ltd. & Anor. [1980] 2 All ER 589 ***(foll)***
Mackender & Ors. v. Feldia A.G. & Ors [1967] 1 QB 590 ***(foll)***
GAF Corpn. v. Amchem Products Inc. [1975] 1 LLR 601 ***(foll)***

Legislation referred to:

Courts of Judicature Act 1964, s. 23
Rules of the High Court 1980, O. 11 r. 4, O. 12 r. 7

For the plaintiffs/appellants - Shahul Hameed Amiruddin; M/s. Sri Ram & Co.
For the defendant/respondent - Benjamin Dawson; M/s. Nik Hussain & Partners

JUDGMENT

Siti Norma Yaakob J:

The defendant in this suit is a merchant banker carrying on business in Singapore and had, pursuant to a loan agreement dated 30 July 1984, lent the plaintiffs, who are Malaysian citizens, residing in Malaysia, in Swiss Francs, the equivalent of A$1.160 million, to enable the plaintiffs to purchase properties in Freemantle, Western Australia.

Upon the parties concluding the loan agreement, the plaintiffs had, in turn paid A$10,000 to the defendant as management fees for all advice rendered or to be rendered by the defendant touching upon and concerning the loan, particularly in all matters relating to fluctuations in

currencies so as to enable the plaintiffs to enjoy the greatest advantage in consequence of such currency fluctuations and which the plaintiffs maintain, form part of the implied term in the loan agreement.

The plaintiffs have now alleged that the defendant had breached this implied term by failing to give proper advice or take reasonable care to ensure that the plaintiffs' interests were sufficiently protected for the plaintiffs had to sell the Freemantle properties to reduce the loan but the proceeds were insufficient to settle the loan in full, thereby causing loss and damage to them. In this suit, the plaintiffs seek general damages for the defendant's breach of the agreement or alternatively for the defendant's negligence and a declaration that they, the plaintiffs, are not indebted to the defendant for any sum whatsoever.

It is not disputed that 6 days after the filing of this suit, and on 13 September 1989, the defendant filed against all the plaintiffs C.S. 1730/83, in the High Court of Singapore (the Singapore suit) seeking principally the return of the loan and following proceedings under O. 14, judgment was entered against the plaintiffs for all sums claimed in the Singapore suit.

The writ and statement of claim in this suit before me was filed on 7 September 1989 and leave to issue a notice of such a writ of summons and service of it on the defendant in Singapore was obtained on 8 September 1989 under O. 11 r. 4 of the High Court Rules 1980, (the Rules).

The defendant has now applied under O. 12 r. 7 of the Rules to have the order dated 8 September 1989, set aside on the grounds that:

(1) the Court has no jurisdiction to try this suit under s. 23 of the Courts of Judicature Act 1964 and

(2) the exercise of the Senior Assistant Registrar's discretion under O. 11 r. 4 was not proper.

On the pleadings, it is clear that the plaintiffs' cause of action is on the tort of negligence and breach of the loan agreement following the omission of the defendant to advice the plaintiffs on the fluctuations in the foreign currencies. It is not disputed that the loan agreement was executed by the plaintiffs in Malaysia and the agreement was then brought to Singapore where it was executed by the defendant's agent. As such the agreement was completed in Singapore.

The issue is where did the cause of action, that is, the tort of negligence or breach of contract occur. Did it occur within the jurisdiction or out of the jurisdiction? In *Castree v. E.R. Squibb & Sons Ltd. & Anor.* [1980] 2 All ER 589, Ackner LJ held that in determining this issue, the Court should look back over the series of events which was said to constitute the tort and say where in substance the cause of action arose. On the facts of the English case, the plaintiffs' cause of action against the German company arose not in Germany but in England since it was not the mere manufacture of the machine but the marketing in England of a defective machine with no warning of its defects which was the substantial wrong doing allegedly committed by the German company. It followed that the Court was entitled to give the defendants leave to serve the third party notice on the German company out of the jurisdiction.

Likewise the wrong doing in this instant case which is being questioned and complained of is the defendant's wrong doing in failing to render a banking service of giving advice to the plaintiffs who reside in Malaysia. The defendant conducts its merchant banking business in Singapore and had not appointed any agent in Malaysia insofar as this loan transaction is concerned. Hence the alleged omission or breach can only happen in Singapore. Moreover,

as it is the defendant who is alleged to have committed the wrong doing, it is only right that he should answer for the wrong doing in the country where he committed the wrong, that is, in Singapore. The fact that the plaintiffs reside in Malaysia is immaterial as jurisdiction does not follow the plaintiffs but the defendant, the tort feasor.

The plaintiffs have also, by their own conduct, submitted to the jurisdiction of the Singapore Courts. They had entered unconditional appearance to the Singapore suit and they were heard in the subsequent O. 14 proceedings. If they believe they had a cause of action against the defendant, they should have filed a counterclaim in the Singapore suit and not preempt the defendant's conduct by filing this suit seeking a declaration that they are not indebted to the defendant.

Under Clause 15.10 of the loan agreement, the parties have agreed that the agreement shall be governed by and construed with, the laws of Singapore. Under Clause 15.11(a)(i) of the same agreement, the plaintiffs had agreed to submit to the non-exclusive jurisdiction of the Courts of Singapore and Malaysia and any state or Federal Court of Australia as the bank may elect.

What is the effect of the presence of a foreign jurisdiction in a contract? That question was answered by the English Court of Appeal in *Mackender & Ors. v. Feldia A.G. & Ors.* [1967] 1 QB 590 when it held that it would not grant leave where there is such a clause in a contract which exists upon the defendant's election. Since this foreign jurisdiction clause gives the defendant the right to elect the Courts where disputes should be heard and determined and by filing the Singapore suit, the defendant has clearly indicated that the Singapore Courts shall have the jurisdiction to try all disputes arising from the loan transaction.

Leave to serve a writ outside the jurisdiction is always discretionary and the general principles to be considered when the exercise of such a discretion is called for are laid down in *GAF Corpn. v. Amchem Products Inc.* [1975] 1 LLR 601 to be the following:

1. There is the overriding consideration that it is a very serious question whether a foreigner ought to be subjected to the inconvenience of having to come to this country in order to defend his rights. The Court ought therefore to be exceedingly careful before allowing a writ to be served out of the jurisdiction.
2. The onus lies on the plaintiff to satisfy two requirements, namely that the case falls within at least one of the limbs of O. 11 r. 1 and further that the case is otherwise a proper one for service out of the jurisdiction.
3. In deciding whether a case falls within one of the limbs of r. 1, the Court considers the substance of the matter and not merely whether the case technically falls within the letter of the limb in question. The case must be clearly within both the letter of the rule and the spirit.
4. If on the construction of any of the paras of O. 11 r. 1, there is any doubt, it ought to be resolved in favour of the foreigner.
5. Even if it is established that the case falls within the rules, it is still a matter of discretion for the Courts whether leave ought to be given particularly where there is another action in respect of the same matter pending in another jurisdiction so that the question of the plaintiff harassing the defendant by multiple litigations may arise.
6. Whether the plaintiff in support of his *ex-parte* application to serve the writ out of the jurisdiction made full and fair disclosure that *ex-parte* applications require. Failure by the plaintiff to make such disclosure will of itself justify the Court in discharging the order, although the plaintiff may thereafter make another application.

On the facts and on the law, the substance of the dispute before me is clearly one for which I have no jurisdiction to decide and determine. To that end the exercise of the discretion by the Senior Assistant Registrar on 8 September 1989 to have the notice of the writ and summons served outside the jurisdiction was not a proper exercise of that discretion. As the proceedings before me was an appeal by the plaintiffs against the Senior Assistant Registrar's decision allowing the defendant's application to set aside the order dated 8 September 1989 I had accordingly dismissed the appeal with costs.

Also found [1992] 2 CLJ 1278